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In the Supreme Court of the United States

October Term, 1984

Jean Marie Jacobs, as Executrix of the Estate of Thomas L. Jacobs, deceased,

Petitioner,

v.

The United States of America,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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EDITOR'S NOTE

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QUESTIONS PRESENTED

1. Whether the doctrine of Feres v. United States, 340 U.S. 135 (1950) serves as an absolute bar to medical malpractice actions brought pursuant to the Federal Torts Claim Act. 28 U. S. C. Section 2671 et seq, solely because the deceased suffered the injuries from this malpractice while on active duty status during corrective surgery which was neither "in the line of duty" nor "incident to service"?

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OPINIONS BELOW

The opinion of the United States Court of Appeal for the Fourth Circuit (App.A) is an unpublished decision. By the Order of the United States District Court for the District of South Carolina, Greenville Division (App.B) is likewise an unreported opinion.

JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit was filed on September 27, 1984. The jurisdiction of this court is invoked under 28 U.S.C. 1254 (1).

STATUTES INVOLVED

28 U.S.C. Section 2671 (App.H)

28 U.S.C. Section 2674 (App.I)

10 U.S.C. Section 1089(a)(App.J)

STATEMENT OF THE CASE

The Petitioner, Jean Marie Jacobs, acting as Executrix of the Estate of her deceased husband, Thomas L. Jacobs, brought this medical malpractice action alleging that the commission of malpractice by the agents and servants of the Respondent United States of Amercia resulted in the wrongful death of her husband. This action was instituted in the United States District Court for the District of South Carolina, Greenville Division, pursuant to 28 U.S.C. Section 1346 (b) and the Federal Torts Claim act (FTCA), 28 U.S.C. Section 2671, et seq. The Plaintiff's deceased was a Major on active duty in the United States Air Force in Sumter, South Carolina, when he elected to undergo elective open heart surgery to repair a congenital heart defect at Wilford

Hall Medical Center at Lackland Air Force Base in San Antonio, Texas. The Plaintiff's deceased was placed on temporary duty status ("TDY") at Wilford Hall Medical Center for the purposes of performing this corrective surgery. The Plaintiff alleges that during the course of this surgical procedure the military physicians at Wilford Hall Medical Center negligently ligated the left circumflex branch of the decedent's coronary artery, which was neither diseased nor involved in the planned operative procedure, with this negligent ligation directly and proximately causing the decedent's death.

The Defendant filed an Answer and thereafter filed a Motion to Dismiss for Summary Judgment pursuant to Federal Rule of Civil Procedure 56(b). On November 23, 1983, the United States District Court

issued its Order granting the Defendant's Motion for Summary Judgment and Dismissing the Plaintiff's Complaint, concluding that the Plaintiff's claim was barred by the so-called "Feres Doctrine".

Thereafter, the Plaintiff appealed this decision to the United States Court of Appeals for the Fourth Circuit, pursuant to 28 U.S.C. 1291. The United States Court of Appeals issued its opinion on September 27, 1984, affirming the decision of the United States District Court, and likewise concluding that the prior decisions of the United States Supreme Court constituting the "Feres Doctrine", bars the Plaintiff's claim.

The Plaintiff, faced with the prospect of receiving only veterans benefits from the United States Government in the combined amount of Three Hundred Twenty-three

($323.00) Dollars per month, has brought this Petition for a Writ of Certiorari pursuant to 28 U.S.C. 1254 (1), seeking an issuance of a Writ to the United States Court of Appeals to insure the proper adjudication of this matter.

RESAONS FOR GRANTING THE PETITION

The United States Court of Appeals decided a substanial federal question in a way contrary to the decisions of this Court in Feres vs. The United States, 340 U.S.C. 135 (1950), and those subsequent cases giving rise to the "Feres Doctrine."

The underlying basis for the Defendant's Motion to Dismiss and for Summary Judgment was the erroneous contention that if, at the time of is negligently performed elective corrective surgery, the Plaintiff's decedent was classified under a duty status that could

be deemed "active", any action under the Federal Torts Claim Act by his Estate would be automatically barred by Feres. The United States District Court and the United States Court of Appeals in the present case both adopted this mechanical and overbroad extension of the "Feres Doctrine."

The Federal Torts Claim Act is devoid of any reference to a statutory or constitutional bar or waiver of an action against the United States by a member of the military service. Rather, the "Feres Doctrine" was merely a judicial interpretation of the Federal Torts Claim Act set down by the United States Supreme Court in 1950 in Feres when it held that:

"...[t]he Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or in the course of activity

incident to service." 340 U.S. 135, 146 (1950).

Nevertheless, subsequent Courts have, on occasion, recognized that a mere demonstration that the Plaintiff is in military service does not, per se, act as an absolute bar to recovery. Utilizing the various guidelines and tests espoused in these subsequent cases, as well as the underlying principles and policy motives which gave rise to Feres, it is submitted that the United States Court of Appeals erred in finding Feres to constitute an absolute bar simply upon the basis that the Plaintiff's decedent was on "active duty". Only if that classification of duty status (i.e. "active") is the determative factor which results in a violation of those policy motives set down as the basis of Feres, should duty status form the basis of this

bar. In the present case, there is no requisite correlation between the decedent's duty status and the underlying principles of the "Feres Doctrine".

The only factual information before the United States District Court and United States Court of Appeals was provided in the Affidavit of Appellant (App. G) and the Plaintiff's Answer to Request for Admission (App. E) which was filed in response to the Defendant's request for Admission (App. D). In the framing of the Respondent's Request for Admission, it is clear that the Respondent's true position is that the Court has no discretion except to apply a purely mechanical fo mula to the Petitioner's claim. This request asked for an admission that "Thomas L. Jacobs was on active duty in the United States Air Force, and was subject to military discipline and to military control", to which the Plaintiff

admitted only that "Thomas L. Jacobs was employed by the United States Air Force, with the remainder of the Request of Admission being denied

Further, in her Affidavit of Appellant, the Plaintiff swore, "during no period of time while at Wilford Hall in either March of 1981 or May of 1981, did the decedent perform <u>any</u> military service-related activities" and neither "was the decedent given any military orders or commands."(App. G). Therefore, it is respectfully submitted that because the Petitioner's deceased traveled to Wilford Hall soley for the purpose of undergoing voluntary elective surgerical procedure, that the implementation of a "duty status" standard is in direct violation of the prior opinions of this Court.

In <u>Brooks v. United States</u>, 337 U.S.C. 49 (1949) the United States Supreme Court

recognized that the mere fact that a claimant is a member of the United States Armed Forces when he sustained an injury or loss as a result of the wrongs of another member of the Armed Forces, does not, of itself, preclude recovery under the Federal Tort Claims Act. Instead, the Courts have consistently required that the status of the Plaintiff in the military be accompanied by some additional inter-relationship between what the Plaintiff was doing at the particular moment of injury and his military status. Additionally, this inter-relationship has been couched in terms of injuries arising out of the "line of duty" or injuries arising "incident to military service." The implementation of a new "active duty" standard is contrary to the prior holdings of this Court and the underlying rationale of these decisions.

The first rationale utilized by the

Supreme Court was the absence of a soldier-government analogy existing in present day (1950) liability law. This was an attempt by the Feres Court to look to the language of the Act which subjects the United States to the same measure of liability as would confront a private individual under like circumstances. The Court found that military servicemen's claims were lacking, reasoning that private persons do not possess such authority as the government has in the echelons of command. Although, the Supreme Court attempted to extend this rationale of analogous private liability as a basis for creating an arbitary bar to recovery in a non-military context Dalehite v. United States, 346 U.S. 15 (1953), this narrow interpertation of the FTCA was struck down by the Court only two (2) years later in Indian Towing Co. v. United States, 350 U.S.

61 (1955). It is respectfully submitted that the recognition by the Court that in Indian Towing, supra that an absolute bar in the non-military context would frustrate the Act's objective of reducing private bills and relieving the injustices caused by sovereign immunity. Further, the thirty-four (34) years of litigation experience now makes immunity the exception rather than the rule and totally discredits the applicability of the first Feres rationale.

The second rationale of Feres was the declared unfairness to the soldier of resolving his claim against the Government pursuant to the law of the state where the alleged wrong occurred, given the soldier's inability to select his duty station. Obviously, the Petitioner would much prefer to apply the law of the State of Texas,

including its law of conflicts rather than to have no tort action at all.

Thirdly, the Court found again that it would be unfair to the serviceman to force him to be bound by a policy of applying law based upon a geographic location. The basis for this principle was that in many states work-connected injuries were covered by a Workmens' Compensation Statutes with no resulting tort liability. Further, of those states where state law would permit tort recovery, the available defenses and amount of recovery would vary dramatically from state to state, thus subjecting the soldier-claimant to a geographic consideration over which he had no control. Again, the possibility of a tort recovery in the present case, regardless of the law imposed by geography, is certainly preferable to no recovery at all. Further-

more, the analogy between state Workmens' Compensation assistance requires the Court to assume some exclusivity clause. A similar exclusivity clause is not contained in the Veterans Benefits Act (38 U.S.C. 740), and, therefore, the third rationale is not violated by the Petitioner's present action.

Fourthly, it has been said that one (1) reason for the Feres result was the availability of veteran's benefits for service-connected injuries. This rationale is without merit when applied to the Plaintiff's litigation, since the Plaintiff's decedent left as surviving beneficiaries his wife and two (2) young children. This family receives from the United States Government in Veterans Compensation and indenmity, the sum of Three Hundred Twenty-three ($323.00) Dollars per month which reduces to Two Hundred Fifty-

five ($255.00) Dollars per month on October 20, 1991 and -0- Dollars as of December 28, 1993 (App. F). The Plaintiff's deceased was a Thirty-two (32) year old practicing endodontist at the time of his death and unquestionably his present earning capacity and future earning potential was far superior to the veterans benefits available to the Plaintiff and her family.

It has now been recognized that the primary rationale behind the "Feres Doctrine" which remains viable is the impropriety of imposing state law on the distinctively federal relationship between a soldier and his government. This rationale is generally referred to as the "maintenance of military discipline" consideration and has been most recently reiterated in the case of Chappell v. Wallace, 103 S. Ct. 2362 (1983) in which the Court concluded:

"The need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel would be undermined by a judicially-created remedy exposing officers to personal liability at the hands of those they are charged to command."(Chappell, p. 2363)

The question then becomes whether or not this admittedly proper goal is rationally furthered by a bar against technically active duty servicemen injured by negligent medical treatment rendered for non-combat related, nontraining related and non-military related disorders. Obviously, military discipline could in no way erode as a result of the maintenance of the present action. There is neither an erosion of military authority nor the ability to command in allowing an individual to maintain a lawsuit against his military physicians when at the time of the alleged negligence that individual was being operated upon while under general

anesthesia. In this factual setting there were no military objectives which required decisive action by a military officer and no order could have been given the Petitioner's decedent for which the decedent would have been able to respond.

Based upon the above-stated rationale, the United States Supreme Court has adopted a "line of duty" standard as opposed to the "active duty" standard utilized by the United States Court of Appeals in the present case. In the case of United States v. Brown 348 U.S. 110 (1954), the Court held as follows:

> "We adhere also to the line drawn in the Feres case between injuries that did and injuries that did not arise out of or in the course of military duty." (Brown p.113)

Subsequently, the Supreme Court again reiterated its adherance to the "line of duty" standard as revealed in the statement of the Court in United States v. Muniz 374

U.S. 150 (1963) where the Court concluded:

"In the last analysis, Feres seems best explained by the peculiar and special relationship of the soldier to his superiors. The effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed found negligent orders given or negligent acts committed in the course of military duty."

This "line of duty" standard continues to be implemented by the Supreme Court and, therefore, the application of an "active duty" standard is in direct violation of the prior decisions of the Court.

Had this "line of duty" standard been implemented, the Petitioner clearly would have been allowed to proceed with her action since the operation undergone by the Petitioner's deceased was not the result of any injury incurred in battle, military exercise or other related military incident. Rather the decedent was undergoing a purely elective surgical procedure for the repair of a congenital

heart defect and was plaed on temporary duty status as a mechanism for transfering the decedent from Shaw Air Force Base where he practiced as an endodontist to Wilford Hall Medical Center. This transfer was at the request of the decedent and was not for the purpose of performing any function for the United States (App. G).

Lastly, it must be noted that at the time of the Feres decision in 1950, 10 U.S.C. §109, which now grants total immunity to military physicians guilty of medical negligence while treating military personnel, was not in existence. In 1950 and prior to the passage of the aforementioned act, a serviceman barred by Feres from recovery against the United States could still bring a subsequent legal action against the individual physician. Now, neither the serviceman nor his family has any remedy, either individually or against

the United States should the "active duty" standard of the United States Court of Appeals be implemented.

If the decision of the United States Court of Appeals stands, then a new standard will have been implemented in direct conflict with the "Feres Doctrine" as established by the prior decisions of the Court, in that recovery will be barred irrespective of whether or not the negligent acts occurred either "in the line of duty" or "incident to military service."

CONCLUSION

A review of the opinion below is necessary to insure the proper application of the standard and rationale of the "Feres Doctrine" and to resolve the conflict of the prior cases of this Court with the new "active duty" standard implemented by the lower Court. Accordingly, the Petitioner

would respectfully request the issuance of a Writ of Certiorari to the United States Court of Appeals to consider the questions presented together with all subsidiary questions fairly included therein.

Respectfully submitted.

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December 19, 1984

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 83-2156

Jean Marie Jacobs, as Executrix of the Estate of Thomas L. Jacobs, deceased, Appellant.

- versus -

The United States of America, Appellee.

Appeal from the United States District Court for the District of South Carolina, at Greenville. G. Ross Anderson, Jr., District Judge. (C/A 83802)

Argued: August 7, 1984. Decided: Sept.27, 1984

Before RUSSELL, HALL AND CHAPMAN, Circuit Judges

Michael Parham (Andrew L. Abrams, Abrams, Bowen and Parham on brief) for Appellant; John B. Grimball, Assistant United States Attorney, for Appellee.

PER CURIAM:

This is a medical malpractice action brought by Jean Marie Jacobs, executrix of the estate of Major Thomas L. Jacobs, against the United States pursuant to the Federal Tort Claims Act, 28 U.S.C. §2671 et seq. The District Court granted summary judgment to the United States, finding that the plaintiff's claim was barred by the doctrine of Feres v. United States, 340 U.S. 135 (1950). We affirm.

Thomas L. Jacobs, the decedent, was a career military officer in the United States Air Force, and was stationed at Shaw Air Force Base, South Carolina, where he served as a dentist. Having been advised that he would need corrective surgery to repair a congential heart defect, Jacobs elected to undergo open heart surgery at Wilford Hall Medical Center, an Air Force hospital near San Antonio, Texas, in March,

1981. He was placed on temporary duty status at Wilford Hall for the purposes of the operation, and was treated by medical personnel employed by the Air Force. After completion of two surgical procedures and convalescence Jacobs was allowed to return to his normal duries. Jacobs died on December 29, 1981, allegedly due to the negligence of the military physicians in ligating a branch of his coronary artery.

Feres holds that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen when the injuries arise out of or in the course of activity incident to service."340 U.S. at 146. The common fact in the three actions held barred in Feres, including two medical malpractice cases involving military surgeons, was that "each claimant, while on active duty and not on furlough, sus-

tained injury due to negligence of others in the armed forces." Id. at 138. The decedent had not been taken off active duty in the Air Force when the alleged malpractice occurred, nor was the temporary reassignment to Wilford Hall the equivalent of a furlough. Accordingly, the plaintiff's claim must be held barred by Feres.

The judgment of the District is accordingly.

AFFIRMED.

APPENDIX B

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF SOUTH CAROLINA

GREENVILLE DIVISION

JEAN MARIE JACOBS, Executrix of the Estate of Thomas L. Jacobs, Deceased,	)	CIVIL ACTION NO. 83-802-3
Plaintiff,	)	
vs.	)	ORDER
UNITED STATES OF AMERICA,	)	
Defendant.	)	

This is a medical malpractice action alleging wrongful death, brought pursuant to 28 U.S.C. §134(b) and the Federal Tort Claims Act (FTCA), 28 U.S.C. §2671, et seq. The complaint filed on April 4, 1983, also contained allegations of constitutional violations arising under 42 U.S.C. §1983 and §1988, as well as under the Fifth and Fourteenth Amendments to the United States Constitution. The Government served and filed its answer in due course, and,

thereafter, filed a motion to dismiss, or for summary judgment.

The motion was heard on October 6, 1983. At the hearing the Plaintiff withdrew, without prejudice, allegations of constitutional violations. The remaining issues are barred by the "Feres Doctrine", on the following facts and authorities.

FINDINGS OF FACT

1. The Plaintiff is a citizen and resident of the State of South Carolina. The acts and omissions complained of occurred in the State of Texas.

2. The plaintiff is the duly appointed, qualified and acting Executrix of the Estate of Thomas L. Jacobs, deceased.

3. At all times complained of, and in particular during 1981, the United States Department of the Air Force operated a hospital near San Antonio, Texas, known as the Wilford Hall USAF Medical Center, at

Lackland Air Force Base, Texas. The medical treatment complained of in this case was at the hands of medical personnel employed by the Department of the Air Force at Wilford Hall Medical Center.

4. The acts of negligence complained of occurred in March, 1981. At that time, and at all other times relevant to this case, Major Thomas L. Jacobs, the decedent, was a career military officer of the United States Air Force who would have been eligible for retirement on December 15, 1990. His permanent duty station during 1981 was Shaw Air Force Base, South Carolina, where he served as a dentist.

5. The medical treatment involved in this case was open heart surgery intended to repair a congenital heart defect. The defect was first detected in November of 1979. In May, 1981, the decedent was

advised that he would need some type of open heart surgery to repair the defect within five years. In November, 1980, the decedent began to experience some chest discomfort and was not able to engage in strenuous activity, to the extent that he had been able to previously, without becoming somewhat short-winded. In early February, 1981, the decedent was advised by various physicians that he soon should undergo corrective heart surgery. As this was elective surgery, he checked with physicians in Florida, in South Carolina, and in Texas, and ultimatley decided that Wilford Hall Medical Center was the best possible location for his surgery.

6. In March of 1981 the deceased was placed on temporary duty status ("TDY") at Wilford Hall Medical Center for purposes of corrective surgery. He underwent a

coronary catheterization which revealed an anomalous left-anterior, descending, coronary artery arising from the pulmonary artery. It was decided by the United States Air Force physicians who were treating Major Jacobs that a saphenous vein by-pass would be performed, to include termination of the blood flow from the pulmonary artery into the anomalous left-anterior, descending coronary artery, with an ultimate by-pass to the aorta. Major Jacobs underwent this surgical procedure at Wilford Hall Medical Center, Lackland Air Corce Base, San Antonio, Texas, in March, 1981.

7. Twenty-four hours after surgery a continous heart murmur was heard. Recatheterization revealed the continued existence of an anomaly in the vessels arising from the pulmonary artery. It was, therefore, determined by the physicians at

Wilford Hall that another surgical procedure was required. This second procedure consisted of the ligation of an orifice from the pulmonary artery, and was performed at Wilford Hall in March, 1981.

8. After completion of the second surgical procedure Major Jacobs was allowed to convalesce and then was returned to normal duties at Shaw Air Force Base, South Carolina. Major Jacobs was given a medical clearance after a six week check-up in September of 1981 and was told to follow his normal lifestyle, including tennis, jogging and other strenuous activity.

9. The surgery undergone by Major Jacobs in March, 1981, at Wilford Hall Medical Center, was elective surgery, voluntarily undergone by him while on duty in the United States Air Force. The surgical and other medical services

provided were provided in the course of his military service in the United States Air Force, by physicians and other medical personnel who themselves were on duty in the United States Air Force and acting within the scope of their employment.

10. On December 29, 1918, while off-duty but not on leave, the deceased collapsed after jogging and died. It is alleged, and for purposes of ruling on the Government's motion taken to be true, that Major Jacobs died because during one of the operative procedures performed in March, 1981, military physicians at Wilford Hall Medical Center negligently ligated the left circumflex branch of the decedent's coronary artery, which was neither diseased nor involved in the planned operative procedure, resulting in a total occlusion of that artery and, ultimately, in a total occlusion of that artery and, ultimately,

in a total occlusion of that artery and, ultimately, in a myocardial infarct to the lateral portion of the left ventricle of his heart, directly and proximately causing his death.

11. On December 29, 1981, the deceased was a thirty-two year old married man, with two minor children. As a direct result of his death, his two children, and his widow, Jean Marie Jacobs, are entitled to receive, and in fact are receiving, Veterans Benefits from the United States Government in the combined amount of Three Hundred Twenty-three ($323.00) Dollars per month, together with One Thousand Sixty ($1,060.00) Dollars per month in Social Security benefits.

CONCLUSIONS OF LAW

The Court has jurisdiction of the parties and of the subject matter pursuant

to the Federal Tort Claims Act.

This action is governed by the Rule enunciated in Feres v. United States, 340 U.S. 135 (1950). In Feres, in evaluating whether a serviceman might have a recognizable cause of action against the United States, the Court concluded that, "the Government is not liable under the Federal Tort Claims Act for injuries to serviceman where the injuries arise out of or are in the course of activity incident to service." 340 U. S. 135, 146 (1950).

The rationale in Feres recently has been affirmed and broadened by the Supreme Court in the case of Stencel Aero Engineering Corp. v. United States, 431 U.S. 666, (1977). In Stencel, a third party plaintiff was denied relief against the United States where that third party was seeking indemnity for damages for which it

was being sued by an injured National Guard officer. The Court held that, "the right of a third party to recover in an indemnity action against the United States ... must be held limited by the rationale of Feres where the injured party is a serviceman." 431 U.S. 666, 674 (1977).

Lower courts have applied the Feres rationale in different ways. Some circuits have applied a strict "but for" test and have denied recovery in cases where the injury was related to or dependent upon the members' military service. Harten v. Coons, 502 F. 2d 1363 (10th Cir. 1974), cert. denied, 420 U.S. 963 (9175); Shults v. United States, 421 F.2d 170 (5th Cir. 1969); Chambers v. United States, 357 F.2d 224 (9th Cir. 1966) (off-duty member injured at base swimming pool); Buer v. United States, 241 F.2d 3 (7th Cir. 1956), cert. denied, 353

U.S. 974 (1957) (soldier injured while on leave but suing for treatment received in military hospital).

Other courts have denied recovery on the basis of the member being subject to military discipline at the time of the injury. Alexander v. United States, 500 F.2d 1 (9th Cir. 1974), cert. denied, 419 U.S. 1107 (1975) (elective gall bladder surgery); Herreman v. United States, 476 F.2d 234 (7th Cir. 1973) (non-duty status National Guard officer during riding space-available in a military aircraft).

In Henninger v. United States, it was held that, "Feres absolutely bars Federal Tort Claims actions by servicemen injured 'while on active duty and not on furlough ... due to the negligence of other in the Armed Forces.'" 473 F.2d 814 (9th Cir. 1973); cert. denied, 414 U.S. 819 (1973).

Henninger involved a case of admitted medical malpractice by U.S. Navy surgeons. The Ninth Circuit reasoned that, in order to preserve discipline and the orderly conduct of military affairs, it is more important to draw a clear line against suit by military personnel against the Government than to be able to justify in every case exactly where the line is drawn.

The Fourth Circuit Court of Appeals follows the mechanical test laid down in Feres, as explained in Henninger. In Hass v. United States, 518 F.2d 1138 (4th Cir. 1975) the plaintiff was on active duty, though in an "off-duty" status, at the time he was injured while riding a horse rented from a Marine Corps stable. The district court granted summary judgment for the Government and the Fourth Circuit affirmed, holding:

> "Incident to service" is not, of course, a narrow term restricted to actual military operations such as field maneuvers or small arms instruction. It has been held that a member of the military is engaged in activity incident to his military service when he is enjoying a drink in a noncommissioned officers club, . . . when he is riding a donkey during a ballgame sponsored by the Special Services division of a naval air station, . . . and while swimming in a swimming pool at an airbase, . . . 518 F.2d at 1141 (citations omitted).
>
> * * * *
>
> We hold that an active duty serviceman, temporarily in off-duty status and engaged in recreational activity on a military base, cannot sue the United States for the alleged negligence of another serviceman or civilian employee of the military. 518 F.2d at 1142.

In Buckingham v. United States, 394 F.2d 483 (4th Cir. 1968), the plaintiff alleged medical malpractice in the refusal of the Langley Air Force Base Hospital to promptly admit the decedent, a master sergeant in United States Air Force. The Fourth Circuit affirmed summary judgment

granted the Government, noting that the case was "not meaningfully distinquishable from Feres", 394 F.2d at 484, and that Congress had provided a uniform system of compensation for the death of a service member.

In Stansberry v. Middendorf, 567 F.2d 617 (4th Cir. 1978), the Fourth Circuit relied on its earlier holding in Hass, supra, in holding that a naval serviceman injured while on "a normal weekend liberty" could not maintain a Federal Tort Claims Act suit against the Government because at the time of alleged neglience "the plaintiff was on active duty and not on furlough", 567 F.2d at 618. Accord, Mariano v. United States, 605 F.2d 721 (4th Cir. 1979).

In Keesler v. United States, 514 F.Supp. 1320 (D.S.C. 1981), the district court gave a thorough review to the Feres Doctrine, noting that in the Fourth Circuit

the test to be applied is a relatively mechanical test, "focusing primarily on the plaintiff's duty status and the location of the tort." 514 F.Supp. at 1322. In Major Jacobs' case the alleged tort was committed by Air Force surgeons at Lackland Air Force Base, Texas while the decedent was in a duty status.

Despite the overwhelming authority supporting application of the Feres Doctrine, the Plaintiff has argued forcefully against application on grounds that it is a judicially declared doctrine that in fairness should not be applied in this case. However, matters of equity cannot decide this case. it is of legal consequences, that Major Jacobs was on duty during the time of his surgery, see Buer v. United States, supra, as well as immediately before and afterwards, and was subject

to the orders and directives of his military superiors at Wilford Hall Medical Center, as were the physicians and staff who treated him. The Feres case itself made clear that "the medical care given servicemen in... hospitals is so entwined with the military relationship that a serviceman cannot bring an action under the FTCA for the negligent provision thereof." Hopkins v. United States, 567 F.Supp. 491, 495 (E.D.N.Y. 1983).

It is also of legal consequences that the surgical procedures undergone by Major Jacobs at a military hospital were available to him as a direct result of his sctive duty status in the United States Air Force. In other words, this surgery, and its consequences, "arise out of or is in the course of an activity incident to service", Feres v. United States, 340 U.S. 135, 146

(1950), and occurred while Major Jacobs was on duty and not on leave or furlough.

It is also of legal consequences that the decedent's beneficiaries, including the Plaintiff herself, are receiving the veterans benefits which Congress has provided as a matter of right, without regard for issues of fault. Stencel Aero Engineering Corp. v. United States, 431 U.S. 666, 671, 673 (1977).

The Plaintiff cites the Court to Downes v. United States, 249 F.Supp. 626 (E.D.N.C. 1965), as support for her argument that Major Jacobs' surgery was not "incident to service" in the context of Feres. Downes is readily distinquishable, however, as the Plaintiff in that case was on pass at the time of his injury in a traffic wreck. Casses involving military leave and furlough are recognized as not arising incident

to service. See Brooks v. United States, 337 U.S. 49 (1949). Futhermore, Downes was decided well in advance of Hass v. United States, 518 F.2d 1138 (4th Cir. 1975) and Stansberry v. Middendorf, 567 F.2d 617 (4th Cir. 1978) which hold contrary to Plaintiff's agrument.

For the foregoing reasons, the Court holds that the Plaintiff's action is barred by the sovereign immunity of the United States, as articulated in Feres and its progeny.

Inasmuch as this motion has been heard with the benefit of responses to discovery requests and of an affidavit of the Plaintiff, it is treated as a motion for summary judgment under FRCP 56(b). Accordingly,

IT IS ORDERED, that the Government's motion for summary judgment be granted, that

the Complaint be dismissed with prejudice as to all claims brought under the Federal Tort Claims Act, and that judgment for the Defendant be entered.

s/G. Ross Anderson, Jr.
G. ROSS ANDERSON, JR.
UNITED STATES DISTRICT JUDGE

Anderson, South Carolina

November 23, 1983

APPENDIX C

UNITED STATES COURT OF APPEALS

for the

FOURTH CIRCUIT

No. 83-2156
C/A 83-802

Jean Marie Jacobs, as Executrix of the Estate of Thomas L. Jacobs, deceased,	)	
	)	Appellant,
versus	)	
	)	
The United States of America,	)	
	)	Appelle.

Appeal from the United States District Court for the District of South Carolina.

This cause come to be heard on the record from the United States District Court for the ------- District of South Carolina, and was argued by counsel.

On consideration whereof, It is now ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is

hereby affirmed.

s/John M. Greacen

CLERK

FILED: September 27, 1984 U.S. Court of Appeals Fourth Circuit

FILED: October 22, 1984 U.S. District Court

APPENDIX D

(CAPTION OMITTED)

Pursuant to Federal Rule of Civil Procedure 36, the Defendant requests that the Plaintiff admit to the following matter:

1. At the time of the death of Thomas L. Jacobs on December 29, 1981, as well as at the time of the cardiac surgery performed on Thomas L. Jacobs on March 9, 1981, as well as during the period of time between these two events, Thomas L. Jacobs was on active duty in the United States Air Force, and was subject to military discipline and to military control.

HENRY DARGAN McMASTER
United States Attorney

By: s/John B. Grimball
JOHN B. GRIMBALL
Assistant United States Attorney

Columbia, South Carolina

June 3, 1983

APPENDIX E

(CAPTION OMITTED)

Pursuant to Rule 36 of the Federal Rule of Civil Procedure, the Plaintiff hereby answers the Defendant's Request for Admission as follows:

1. The Plaintiff admits only so much of the Defendant's Request for Admission as alleges that at the time of the death of Thomas L. Jacobs, as well as at the time of the cardiac surgery performed on him, as well as during the period of time between these two events, Thomas L. Jacobs was employed by the United States Air Force.

The remainder of the Defendant's Request for Admission is denied. Such denial is, however, qualified to the extent that Plaintiff admits that on the date of the surgical procedures performed upon Plaintiff's deceased, upon information and

belief, at the precise time of the negligent acts and omissions on the part of the Plaintiff's deceased's surgeon, the Plaintiff's deceased was "TDY" to Wilford Hall and at the time of the negligent acts on the part of the Plaintiff's deceased's surgeons, Plaintiff's deceased was under general endotracheal anesthesia, and subject only to the control of his treating surgeon.

ABRAMS, BOWEN & PARHAM

By: s/William L. Dodson, Jr.
FOR: MICHAEL PARHAM
ATTORNEY FOR THE PLAINTIFF

Greenville, South Carolina

June 30, 1983

APPENDIX F

(CAPTION OMITTED)

ANSWER TO INTERROGATORY #8

Benefits due Jean S. Jacobs; Thomas Lee Jacobs, Jr., and Elizabeth Marie Jacobs from the United States Government amount to Three Hundred Twenty-Three ($323.00) Dollars per month in VA compensation and indemnity. It is the understanding of the plaintiff that this amount shall drop to the sum of Two Hundred Fifty-Five ($255.00) Dollars per month as of October 20, 1991 and amount to zero dollars as of December 28, 1993. The plaintiff also receives One Thousand Sixty ($1,060.00) Dollars per month in Social Security benefits, which she understands shall continue until the children complete their education. The only other benefits received by the plaintiff was $35,000.00 in serviceman's insurance.

APPENDIX G

(CAPTION OMITTED)

PERSONALLY appeared before me, Jean Marie Jacobs, (Jean Marie Riddle), who, upon oath, would say as follows:

That she is the plaintiff-executrix, and the surviving widow of Thomas L. Jacobs, deceased, who now brings this action both on her behalf and on the behalf of his two surviving children; that the decedent was a career military officer of the United States Air Force eligible for retirement after twenty (20) years of service on December 15, 1990; that nevertheless the decedent had, in October and November of 1981, considered the possibilty of ending his military service and engaging in private practice at some location in South Carolina; during the latter part of 1981 your affiant and the decedent did inspect various

locations for his possible entry into private practice.

The congential heart defect, its repair being the basis of this action, was not detected until November of 1979. In May of 1980 the decedent was advised that he would need some type of open heart surgery to repair the defect within five (5) years. In November of 1980 the decedent began to experience som chest discomfort and was not able to engage in strenuous activity to the extent he had previously engaged without becoming somewhat short-winded.

In early February, 1981, the decedent was advised by various physicians that he should undergo the surgery soon and, therefore, he checked with physicians in Florida, Greenville, South Carolina and San Antonio, Texas, but ultimately advised that

Wilford Hall was the best possible location for his surgery. Dr. Gerry Harmon, Department of Flight Surgery, Shaw Regional Hospital, Shaw Air Force Base; Dr. Shields Stutts, San Antonio, Texas; Dr. P. I. Lupo, Greenville, South Carolina; and Dr. B. Bruce McGraw, and Dr. William Wolverton, both of Pensacola, Florida, are aware of these initial contacts and recommendations. Therefore, the decedent was ultimately scheduled for surgery under the treatment and care of Dr. Robert Barnes, of the Thoracic and Cardiovascular Surgery Team at Wilford Hall Medical Center. The surgery was to take place in March of 1981. An initial surgical procedure was performed in March of 1981, and within twenty-four (24) hours after the rediscovery of a murmur, another surgical procedure took place. It was during the initial porcedure

that the decedent's left circumflex branch was ligated, totally ecluding the flow of blood through a portion of his heart and resulting in severe and acute damage. This negligent ligation of the left circumflex branch of the decedent's coronary artery went undetected in the subsequent surgical procedure which took place in March of 1981.

Furthermore, the negligent ligation of this artery again went undetected when the decedent was given a medical clearance after six (6) week check-up in September of 1981 and was told to continue a very normal lifestyle including tennis, jogging and other strenuous activity.

On Tuesday afternoon at 4:30 p.m. on December 29, 1981 while jogging, the decedent fell and experienced heart failure which has been clearly attributed to the negligent surgical ligation of certain

coronary arteries, as more fully appear by the copies of autopsy reports attached hereto. The decedent was immediately taken by City Ambulance to Toumey Hospital in Sumter, South Carolina, where he was pronounced dead.

Subsequently your affiant was contacted by Dr. Robert Barnes, the surgeon who performed the original surgical procedures upon the decedent, who stated "(that) he was sorry and that he couldn't believe he had made a mistake and why in the world did it take eight months for this to come about."

Your affiant is informed, alleges and believes that the decedent's designation of duty as "TDY" was only a mechanism to be utilized for military purposes to transfer the decedent to Wilford Hall for the performance of the surgical procedures in

March of 1981. During no period of time while at Wilford Hall in either March of 1981 or May of 1981 did the decedent perform any military service-related activities. Furthermore, your affiant is informed, alleges and believes that at no time during the decedent's visit to Wilford Hall in March of 1981 and subsequently in May of 1981, was the decedent given any military orders or commands.

So sayth your affiant.

s/Jean Marie Jacobs
JEAN MARIE JACOBS
(RIDDLE)

APPENDIX H

28 U.S.C. §2671

...."Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States, means acting in line of duty.

APPENDIX I

28 U.S.C. §2674

"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof."

APPENDIX J

10 U.S.C. §1089

§1089. Defense of certain suits arising out of medical malpractice

(a) The remedy against the United States provided by sections 134(b) and 2762 of title 28 for damages for personal injury, including death, caused by negligent or wrongful act or omission of any physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (including medical and dental technicians, nursing assistants, and therapists) of the armed forces, the National Guard while engaged in training or duty under section 316, 502, 503, 504, or 505 of title 32, the Department of Defense, or the Central Intelligence Agency in the performance of medical, dental, or related health care functions

(including clinical studies and investigations) while acting within the scope of his duties or employment therein or therefor shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against such physicians, dentist, nurse, pharmacist, or paramedical or other supporting personnel (or the estate of such person) whose act or omission gave rise to such action or proceeding.

Office - Supreme Court, U.S.
FILED
APR 18 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-996

In the Supreme Court of the United States

OCTOBER TERM, 1984

JEAN MARIE JACOBS, EXECUTRIX OF THE ESTATE OF THOMAS L. JACOBS, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

8 pp

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In the Supreme Court of the United States

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JEAN MARIE JACOBS, EXECUTRIX OF THE ESTATE OF THOMAS L. JACOBS, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, executrix of the estate of a serviceman, seeks damages from the government under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346 and 2671 *et seq.*, on the ground that the death of the serviceman was caused by the negligence of military physicians. Petitioner contends that the court of appeals erred in holding that this action is barred by *Feres* v. *United States*, 340 U.S. 135 (1950), which precludes FTCA suits on behalf of servicemen for alleged torts incident to military service.

1. Petitioner is the widow of Thomas L. Jacobs and the executrix of Jacobs's estate. Jacobs was a major on active duty in the United States Air Force (Pet. App. 7a). In March 1981, Jacobs underwent open-heart surgery at a United States Air Force medical center (*id.* at 9a-10a). The

surgery was performed by Air Force physicians (*id.* at 11a). After surgery and recuperation, Jacobs returned to his normal duties. On December 29, 1981, Jacobs collapsed while jogging and died. Petitioner applied for and now receives Veterans Benefits for the death of Major Jacobs. *Id.* at 11a-12a.

2. Petitioner brought this action under the FTCA in the United States District Court for the District of South Carolina, alleging that Jacobs's death was caused by the negligence of the Air Force physicians who performed the surgery. The district court concluded that petitioner's claim arose out of activity incident to military service and therefore was barred by *Feres*. Pet. App. 5a-23a. The court of appeals affirmed in a brief per curiam opinion (*id.* at 1a-4a). The court held that the case was squarely governed by *Feres*, noting that "the three actions held barred in" *Feres* "includ[ed] two medical malpractice cases" (Pet. App. 3a).

3. The decision of the court of appeals is plainly correct. Petitioner acknowledges that Jacobs was on active duty when he was allegedly injured by a fellow servicemember in a military hospital (*e.g.*, Pet. 2, 7). Petitioner nevertheless contends (*e.g.*, Pet. 9, 16-19) that *Feres* does not bar her claim because Jacobs was not carrying out orders when he was injured and was not injured in a "battle, military exercise or other related military incident" (Pet. 18).

This contention is foreclosed by the *Feres* decision itself. The Court in *Feres* decided three consolidated cases: *Feres* v. *United States, Jefferson* v. *United States,* and *United States* v. *Griggs*. See 340 U.S. at 135 & n.*. As the court of appeals noted, *Jefferson* and *Griggs* both involved FTCA claims on behalf of servicemen who were allegedly subjected to medical malpractice by military surgeons while they were on active duty. *Id.* at 137. This Court held that those claims were barred. Petitioner does not purport to

distinguish, and cannot distinguish, *Jefferson*, *Griggs*, or any of the numerous court of appeals decisions that have uniformly rejected arguments similar to petitioner's and held that "[m]alpractice suits involving medical treatment of active-duty servicemen in military hospitals are barred [by] *Feres*." *Hamilton* v. *United States*, 564 F. Supp. 1146, 1148 (D. Mass.), aff'd, 719 F.2d 1 (1st Cir. 1983). See, *e.g.*, *Hall* v. *United States*, 451 F.2d 353, 354 (1st Cir. 1971); *Norris* v. *United States*, 137 F. Supp. 11, 12 (E.D.N.Y. 1955), aff'd, 229 F.2d 439 (2d Cir. 1956); *Henning* v. *United States*, 446 F.2d 774, 777-778 (3d Cir. 1971), cert. denied, 404 U.S. 1016 (1972); *Buckingham* v. *United States*, 394 F.2d 483, 484 (4th Cir. 1968); *Lowe* v. *United States*, 440 F.2d 452, 453 (5th Cir.), cert. denied, 404 U.S. 833 (1971); *Johnson* v. *United States*, 631 F.2d 34, 36 (5th Cir. 1980), cert. denied, 451 U.S. 1018 (1981); *Buer* v. *United States*, 241 F.2d 3, 6 (7th Cir. 1956), cert. denied, 353 U.S. 974 (1957); *Henninger* v. *United States*, 473 F.2d 814, 815 (9th Cir.), cert. denied, 414 U.S. 819 (1973); *Veillette* v. *United States*, 615 F.2d 505, 507 (9th Cir. 1980); *Harten* v. *Coons*, 502 F.2d 1363, 1365 (10th Cir. 1974), cert. denied, 420 U.S. 963 (1975); *Labash* v. *United States Department of Army*, 668 F.2d 1153, 1155 (10th Cir.), cert. denied, 456 U.S. 1008 (1982).[1]

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[1]Petitioner seems to suggest (Pet. 5, 18) that a different result is called for by the fact that surgery here was elective. But petitioner does not explain why it should make a difference that he underwent only elective surgery. As the courts of appeals have held, any surgery — elective or not — that a serviceman on active duty undergoes at the hands of military doctors is activity incident to military service. See, *e.g.*, *Lowe* v. *United States*, 440 F.2d 452, 453 (5th Cir.), cert. denied, 404 U.S. 833 (1971); *Harten* v. *Coons*, *supra*.

Petitioner also asserts (Pet. 20) that 10 U.S.C. 1089, which renders military physicians and other medical personnel of the armed forces immune from personal liability for malpractice actions, somehow calls into doubt the correctness of *Feres*. That statute, however, simply makes the FTCA the exclusive remedy for medical malpractice claims

Petitioner also contends that the justifications the Court has advanced for the *Feres* doctrine do not warrant its application to medical malpractice claims; in essence, petitioner asks the Court to overrule *Feres* insofar as it applies to such claims. See Pet. 16-17. The Court declined to review a similar contention in *Chaffee* v. *United States,* cert. denied, 464 U.S. 915 (1983), and there is no more reason to reconsider *Feres* now. As we explained in our memorandum in opposition in *Chaffee* (at 3-4),[2] these arguments should be addressed to Congress, not to this Court. In *Feres* itself the Court noted that "if we misinterpret the [FTCA], * * * Congress possesses a ready remedy" (340 U.S. at 138). Congress has recently refused to enact proposed legislation that would have abolished the *Feres* doctrine with respect to claims "aris[ing] out of medical or dental care furnished * * * in a Department of Defense hospital." H.R. 1942, 98th Cong., 1st Sess. 2 (1983).[3] Thus, Congress is well aware that *Feres* bars claims for medical malpractice like those raised by petitioner and has made a decision not to overrule that aspect of the 35-year-old *Feres* doctrine. In these

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against military personnel; it does not abrogate *Feres*. See S. Rep. 94-1264, 94th Cong., 2d Sess. 4-6 (1976). In fact, 10 U.S.C. 1089(e) provides that the defenses normally available to the government in an FTCA suit by virtue of 28 U.S.C. 2680(h) "shall not apply to any cause of action arising out of a negligent or wrongful act or omission in the performance of medical, dental, or related health care functions"; this shows that Congress knew how to abrogate FTCA defenses in malpractice actions when it wished to do so, and its decision not to abrogate *Feres* — which is not one of the defenses enumerated in 28 U.S.C. 2680(h) — reflects a determination to maintain that defense intact. See also *Hawe* v. *United States*, 670 F.2d 652 (6th Cir. 1982); *Howell* v. *United States,* 489 F. Supp. 147, 150 (W.D. Tenn. 1980); *Bass* v. *Parsons,* 577 F. Supp. 944, 949 (S.D. W. Va. 1984).

[2]We have sent a copy of our memorandum in *Chaffee* to counsel for petitioner.

[3]A similar bill has been introduced in this session of Congress. See H.R. 1161, 99th Cong., 1st Sess. (1985).

circumstances, the Court plainly should not intervene. See *Flood* v. *Kuhn*, 407 U.S. 258, 283-284 (1972).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEF
Solicitor General

APRIL 1985

DOJ-1985-04